

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re DEEP VEIN THROMBOSIS
LITIGATION

MDL Docket No 04-1606 VRW

AMENDED ORDER

This Document Relates To:

Halterman v Delta Airlines, Inc,
Qantas Airways, Limited and
Skywest, Inc, No 04-3953

Deep vein thrombosis (DVT) is a medical condition that occurs when a thrombus (a blood clot) forms in a deep vein, usually in the extremities of the leg. DVT can lead to serious injury or death if the thrombus breaks off and lodges in the brain, lungs or heart, thereby causing a heart attack, stroke or other debilitating effects. Studies indicate a link between air travel and DVT, which can be attributed to relatively prolonged periods of immobility coupled with low cabin pressure and poor oxygenation (technically, "hypobaric hypoxia"). Plaintiffs in this litigation suffered (or sue on behalf of an individual who suffered) from DVT-related injuries during or after travel aboard commercial aircraft.

1 On June 25, 2004, the Judicial Panel on Multidistrict
2 Litigation centralized pre-trial proceedings in cases involving
3 "complex core questions concerning whether various aspects of
4 airline travel cause, or contribute to, the development of deep
5 vein thrombosis in airline passengers." Doc #1 at 2. Ultimately,
6 all transferred actions were assigned to the undersigned. On
7 February 14, 2005, the court granted summary judgment in favor of
8 Boeing in its capacity as manufacturer of the aircraft in question
9 in 17 cases. Doc #144, 356 F Supp 2d 1055 (ND Cal 2005). All
10 claims against airline defendants arising from domestic flights
11 ("non-Warsaw cases") have been dismissed pursuant to the federal
12 preemption rationale announced in the court's order of March 11,
13 2005. Doc #151, 2005 WL 591241 (ND Cal Mar 11, 2005). See also
14 Witty v Delta Air Lines, Inc., 366 F3d 380 (5th Cir 2004).

15 MDL 1606 included approximately 50 cases in which
16 plaintiffs alleged that they suffered from DVT-related injuries
17 during or after international flights ("Warsaw cases"). On August
18 21, 2006, the court granted summary judgment in 37 Warsaw cases in
19 which plaintiffs alleged liability based on asserted failure to
20 warn regarding DVT. Doc #469, 2006 WL 2547459 (ND Cal Aug 21,
21 2006). The court directed entry of summary judgment under FRCP
22 54(b) in favor of any airline defendant against which the only
23 Warsaw Convention accidents alleged were "the onset of DVT or the
24 absence or insufficiency of a warning regarding DVT or policy level
25 decisions regarding the same." Id.

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The following Warsaw Convention DVT cases remain in MDL 1606:

Dabulis v Singapore Airlines, Inc, No 03-1929
Richelet v Lufthansa German Airlines, No 04-3831
Halterman v Delta Airlines, Inc, Qantas Airways, Limited and Skywest, Inc, No 04-3953
Rietchel v US Airways, Inc, No 01-3444
Braha v Delta Airlines, Inc, No 05-1544
Bianchetti v Delta Airlines, Inc, No 04-4860
Vincent v American Airlines, Inc, No 07-1604

Before the court is defendant Qantas Airways' motion for summary judgment in the Halterman case (Doc #27, 04-3953). For reasons discussed below, Qantas's motion is GRANTED.

I

Except as otherwise noted, the following facts are undisputed. In 2001 or early 2002, Greg Halterman was diagnosed with Factor V Lieden. Doc #27, Ex A at 31:24-32:2. According to Halterman, individuals with Factor V Leiden have blood that clots "a little bit faster than average." Id at 31:4-13.

On October 25, 2002, Halterman was a fare paying passenger on a Skywest, Inc flight from Colorado Springs, Colorado to Salt Lake City, Utah. Compl (Doc #4, 04-3953) ¶ 8. Halterman thereafter connected with a Delta Airlines, Inc flight from Salt Lake City to Los Angeles. Id. After a four hour layover in Los Angeles, Halterman boarded Qantas Airways flight number QF94 for what he thought would be an overnight direct flight to Melbourne, Australia. Id, Doc #613 (04-1606) ¶¶ 2-3. Instead of flying direct to Melbourne, QF94 stopped in Sydney for a layover. Id. Halterman claims that the layover lasted approximately 3 hours. Id. Qantas represents that the layover was actually 1 hour and 57

1 minutes. Doc #27 at 2, n 2. After the layover in Sydney,
2 Halterman reboarded QF94 and flew to Melbourne, arriving on October
3 27, 2002. Compl (Doc #4, 04-3953) ¶ 8.

4 Halterman did not experience any trauma during the
5 flight. Doc #27, Ex A at 105:6-9. Halterman never requested any
6 medical assistance from the Qantas flight attendants during the
7 flight. Id at 105:10-13. Nor did Halterman advise the flight
8 attendants that he was experiencing any type of medical emergency
9 during the flight. Id at 105:14-18.

10 Halterman testified that he first noticed pain in his
11 right calf upon deplaning in Sydney during the layover. Doc #613
12 (04-1606) ¶ 5. Halterman attributed the pain to "having been
13 seated for such a long period of time." Id. Halterman continued
14 to experience the pain during his time in Australia and, two weeks
15 after arriving in Melbourne, sought out medical attention. Id, ¶¶
16 5, 7; Doc #27, Ex A at 120:14-18. Dr Michelle Wong, a physician in
17 Australia, diagnosed DVT in the same part of Halterman's right leg
18 where he first experienced pain when he deplaned in Sydney. Id.
19 Dr Wong wrote a letter, dated November 19, 2002, confirming
20 Halterman's DVT diagnosis and associating it with the long flight
21 from Los Angeles to Australia. Id, Ex A.

22 Halterman filed his complaint on September 20, 2004. Doc
23 #1 (04-3953). In addition to failure to warn, which the court has
24 already rejected, Halterman contends that one or more of the
25 following constituted an Article 17 accident: layover, irregular
26 altitude, inadequate air circulation and oxygenation, inadequate
27 pressurization, turbulence, cramped seating, inadequate hydration,
28 improper weight balance and failure to inspect and/or make repairs

1 to defective mechanical components. Compl (Doc #4, 04-3953) ¶¶ 8-
2 12. On June 8, 2007, plaintiff voluntarily dismissed defendants
3 Delta Airlines, Inc and Skywest, Inc. Doc ##599, 600 (04-1606).
4 Accordingly, Qantas is the only remaining defendant.

6 II

7 "Once a properly documented motion has engaged the gears
8 of Rule 56, the party to whom the motion is directed can shut down
9 the machinery only by showing that a trialworthy issue exists."
10 McCarthy v Northwest Airlines, Inc, 56 F3d 313, 315 (1st Cir 1995).
11 That is, the court must determine whether genuine issues of
12 material fact exist, resolving any doubt in favor of the party
13 opposing the motion. "Only disputes over facts that might affect
14 the outcome of the suit under the governing law will properly
15 preclude the entry of summary judgment." Anderson v Liberty Lobby,
16 Inc, 477 US 242, 248 (1986). Further, "summary judgment will not
17 lie if the dispute about a material fact is 'genuine,' that is, if
18 the evidence is such that a reasonable jury could return a verdict
19 for the nonmoving party." Id. And the burden of establishing the
20 absence of a genuine issue of material fact lies with the moving
21 party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). Summary
22 judgment is granted only if the moving party is entitled to
23 judgment as a matter of law. FRCP 56(c).

24 The nonmoving party may not simply rely on the pleadings,
25 however, but must produce significant probative evidence, by
26 affidavit or as otherwise provided in FRCP 56, supporting its claim
27 that a genuine issue of material fact exists. TW Elec Serv, Inc v
28 Pacific Elec Contractors Ass'n, 809 F2d 626, 630 (9th Cir 1987).

1 Summary judgment is appropriate when the nonmoving party "fails to
2 make a showing sufficient to establish the existence of an element
3 essential to that party's case, and on which that party will bear
4 the burden of proof at trial." Celotex at 322. The evidence
5 presented by the nonmoving party "is to be believed, and all
6 justifiable inferences are to be drawn in his favor." Anderson,
7 477 US at 255. "[T]he judge's function is not himself to weigh the
8 evidence and determine the truth of the matter but to determine
9 whether there is a genuine issue for trial." Id at 249.

10 The evidence presented by both parties must be
11 admissible. FRCP 56(e). Conclusory, speculative testimony in
12 affidavits and moving papers is insufficient to raise genuine
13 issues of fact and defeat summary judgment. Thornhill Publishing
14 Co, Inc v GTE Corp, 594 F2d 730, 738 (9th Cir 1979). Hearsay
15 statements in affidavits are inadmissible. Japan Telecom, Inc v
16 Japan Telecom America Inc, 287 F3d 866, 875 n 1 (9th Cir 2004).

18 III

19 The United States adheres to the Convention for the
20 Unification of Certain Rules Relating to International
21 Transportation by Air, concluded at Warsaw, Poland, October 12,
22 1929, popularly referred to as the "Warsaw Convention." 49 Stat
23 3000, reprinted in note following 49 USC § 40105. The purposes of
24 the Warsaw Convention are two-fold: "providing uniformity in
25 respect to documentation and certain procedural matters, and
26 imposing limitations on liability." In re Aircrash in Bali,
27 Indonesia on April 22, 1974, 684 F2d 1301, 1307 (9th Cir 1982).
28 See also Maugnie v Compagnie Nationale Air France, 549 F2d 1256,

1 1259 (9th Cir 1977) ("[T]he Convention functions to protect
2 passengers from the hazards of air travel and also spreads the
3 accident cost of air transportation among all passengers.").

4 "[R]ecovery for a personal injury suffered on board an
5 aircraft or in the course of embarking or disembarking, if not
6 allowed under the Convention, is not available at all." El Al
7 Israel Airlines, Ltd v Tseng, 525 US 155, 161 (1999) (quotations
8 and citation omitted). Halterman does not dispute that the injury
9 he sustained (DVT and resultant complications) was triggered during
10 "international transportation" for purposes of Article 1(2). Nor
11 does Halterman dispute that the Warsaw Convention applies and
12 preempts all claims arising under local law. Accordingly,
13 Halterman can recover from Qantas, if at all, only within the
14 framework established by the Warsaw Convention.

15 Article 17 of the Warsaw Convention provides:
16 The carrier shall be liable for damage sustained in
17 the event of the death or wounding of a passenger or
18 any other bodily injury suffered by a passenger, if
the accident which caused the damage so sustained
took place on board the aircraft or in the course of
any of the operations of embarking or disembarking.

19 49 Stat 3018 (emphasis added).

20 In other words, as explained by the Supreme Court in Air
21 France v Saks, 470 US 392 (1985), a carrier "is liable to a
22 passenger under the terms of the Warsaw Convention only if the
23 passenger proves that an 'accident' was the cause of her injury."
24 *Id* at 396. In Saks, the Supreme Court defined "accident" for
25 purposes of Article 17 as "an unexpected or unusual event or
26 happening that is external to the passenger." *Id* at 405. "This
27 definition should be flexibly applied after assessment of all the
28 circumstances surrounding a passenger's injuries." *Id*. And

1 because any injury "is the product of a chain of causes," a
2 plaintiff need only show that "some link in the chain was an
3 unusual or unexpected event external to the passenger." Id at 406.

4 When, however, "the injury indisputably results from the
5 passenger's own internal reaction to the usual, normal, and
6 expected operation of the aircraft, it has not been caused by an
7 accident, and Article 17 of the Warsaw Convention cannot apply."
8 Id. And because DVT "clearly is the type of internal reaction to
9 the normal operation of the aircraft, with no unusual external
10 event," the development of DVT is not itself an accident within the
11 meaning of Article 17. Rodriguez v Ansett Australia Ltd, 383 F3d
12 914, 917 (9th Cir 2004), cert denied, 544 US 922 (2005). But DVT-
13 related injuries may be compensable under the Warsaw Convention if
14 caused by an Article 17 accident. With these principles in mind,
15 the court proceeds to Qantas's motion.

16
17 A

18 Qantas argues that Halterman has not produced and is
19 unable to produce any evidence to support his allegations. Doc #27
20 at 10-11. Qantas does not possess any documents that show any
21 malfunction on the aircraft, and Halterman has not produced any.
22 Id at 11. Halterman testified in a deposition that he has no
23 reason to believe that there was irregular altitude, inadequate air
24 circulation, inadequate oxygenation or inadequate pressurization on
25 the flight. Doc #27, Ex A (Halterman dep) at 101:10-25, 102:1-16,
26 111:11-25, 112:1-7.

27 Qantas also addresses Halterman's allegations that he was
28 rendered immobile as the result of sleeping passengers, the "fasten

1 safety belt" sign and the flight attendants' service of in-flight
2 meals. Doc #27 at 14. Specifically, in response to Qantas's
3 request to describe every unexpected or unusual event that occurred
4 on the subject flight, Halterman stated:

5 Plaintiff Halterman was seated against the window and
6 next to 2 larger men (6'2" or taller and 225 pounds or
7 heavier) who blocked access to the aisle way, further
8 limiting the ability to get up and move around on the
9 flight and ensure adequate blood flow in the lower
10 extremities. * * * During periods of turbulence, the
11 seatbelt light was lit in the cabin. When not lit, the
12 crew served meals or beverages and their carts obstructed
13 the aisles making it a real challenge to walk around the
14 cabin and use the lavatory. During these times, Mr
15 Halterman could not get up and walk around to stretch.
16 Instead he was forced to stay seated.

17 Doc #27, Ex D at 2:8-18.

18 Qantas points out that Halterman testified in deposition
19 that he actually was able to get out of his seat and use the
20 lavatory "once or twice towards the end of the flight." Doc #27,
21 Ex A at 98:25-99:5. Halterman also testified that he could have
22 used the lavatory earlier but that he was being courteous to his
23 fellow passengers because they were sleeping. Id at 106:5-107:17.
24 Qantas argues that it cannot be unexpected or unusual that a
25 "bigger" passenger may sit next to "you" during a flight or that a
26 passenger seated next to "you" might sleep during the flight. Doc
27 #27 at 15-16. Qantas cites to Potter v Delta Airlines, Inc, 98 F3d
28 881, 884 (5th Cir 1996) in which the Fifth Circuit held that the
act of sleeping during a flight is not an unusual or unexpected
event. Qantas further argues that temporary periods during which a
passenger is required to remain seated due to turbulence, in-flight
meal service or for other reasons are not unexpected or unusual
events. Doc #27 at 15-16.

1 Regarding Halterman's alleged dehydration, Qantas points
2 out that plaintiff admitted that he had "approximately two small
3 cups" of liquid during the flight and that he kept liquids to a
4 minimum "so as not to have to go to the lavatory." Doc #27, Ex D
5 at 2:18-21. And Halterman testified at deposition that he never
6 made a request for a beverage that was refused. Doc #27, Ex A
7 (Halterman dep) at 105:2-5 ("Q: At any time during your Qantas
8 flight from Los Angeles to Sydney, did you ever request a flight
9 attendant to bring you a beverage that you were refused? A: No.")

10 Regarding Halterman's allegation of cramped seating,
11 Qantas points out that Halterman has produced no evidence that his
12 seat onboard QF94 was defective in any manner. Doc #27 at 17.
13 Moreover, Qantas argues that being in cramped seating, even for
14 extended periods of time, cannot qualify as an unexpected event.
15 Id. Qantas points to Margrave v British Airways, 643 F Supp 510,
16 512 (SDNY 1986), in which the Southern District of New York held
17 that "extended sitting in an airplane, even in an uncomfortable
18 position, cannot properly be characterized as the sort of
19 'accident' that triggers an airline's liability under the Warsaw
20 Convention."

21 Finally, Qantas addresses Halterman's allegations of
22 delay resulting from the rerouting of QF94 through Sydney.
23 Halterman alleges in his complaint that:

24 Apparently due to irregular circumstances deviating from
25 the normal operation of this flight, Qantas was forced to
26 stop in Sydney for an unplanned, unexpected, and unusual
27 layover, deviating from the pre-planned direct flight
28 from Melbourne. * * * At all relevant times hereto,
Qantas Airways, Limited experienced an unexpected,
unusual delay as a result of various factors, including
but not limited to the aircraft's fuel imbalance due to a

1 mismanaged fuel and/or cross-feed or a mismanaged fuel
2 tank transfer, and/or as a result of other unexpected,
unusual and abnormal deviations from industry standards,
3 policies or rules.

4 Compl (Doc #4, 04-3953) at 4:7-11; 4:26-5:3.

5 Qantas asserts that these allegations are false and that
Halterman cannot produce any evidence of such "fuel imbalance."
6 Doc #27 at 18-19. Notably, Qantas submits the declarations of two
7 of the pilots on the subject flight - Geoff Paul, who flew Los
8 Angeles to Sydney on October 25, 2002, and Robert Clifton, who flew
9 Sydney to Melbourne on October 27, 2002. Doc ##28, 29. Qantas
10 also submits the declaration of John Xuereb, the "Manager of
11 Schedules Variation" in the Schedule Planning Department at Qantas.
12 Doc #30. Because these declarations are the subject of Halterman's
13 evidentiary objections, the court recites their contents here.
14 Paul and Clifton both declare:

15 Based on my understanding, QF94 was originally scheduled
16 as a direct flight from Los Angeles to Melbourne but, on
17 October 23, 2002, QF94 was rerouted by our Scheduling
18 Planning Department in Sydney to operate Los Angeles to
Melbourne with a stop in Sydney. QF94's stop in Sydney
was pre-planned and expected by myself and the rest of
the flight crew.

19 QF94 did not divert to Sydney as a result of any type of
20 fuel imbalance, fuel mismanagement, mismanaged fuel tank
21 transfer, or any other aircraft malfunction. The flight
plan called for us to go to Sydney before continuing to
Melbourne.

22 To the best of my recollection, there was nothing
23 unexpected or unusual about the operation of QF94 on
October 25 [and 27], 2002. If there had been anything
unexpected or unusual regarding the operation of QF94, I
24 would have filed an irregularity report. I did not file
such a report because QF94 operated as a normal flight.

25 I do not recall experiencing any particular maintenance
26 issues with the aircraft operating as QF94. In
particular, I do not recall any issues involving
27 irregular altitude, inadequate air circulation and
oxygenation, inadequate pressurization within the cabin
28 due to a faulty and abnormal pressurization system(s),

1 turbulence, cramped seating, or inadequate hydration of
2 passengers.

3 If there had been any fundamental maintenance items
4 outstanding, I would not have flown the aircraft
5 operating as QF94.

6 Doc #28 (Paull Dec) ¶¶ 4-9; Doc #29 (Clifton Dec) ¶¶ 4-9.

7 Mr Xuereb declares:

8 By way of my position with Qantas, I am knowledgeable of
9 the schedule planning of Qantas flights departing from
10 the United States and, specifically, Los Angeles
11 International Airport ("LAX"). I was also knowledgeable
12 of this schedule planning in October of 2002.

13 Qantas Flight No 94 ("QF94") operating on October 25,
14 2002, was originally scheduled to be a direct flight from
15 Los Angeles to Melbourne.

16 On October 23, 2002, QF94 was rerouted by my department,
17 Network Planning (Sydney), to operate Los Angeles to
18 Melbourne with a stop-over in Sydney. QF94's stop-over
19 in Sydney was pre-planned and expected.

20 The decision to re-route QF94 was made for commercial
21 reasons. The specific commercial reasons that QF94 was
22 rerouted are unknown at this time because the records
23 have been routinely disposed of in accordance with
24 Qantas' document retention policy.

25 Doc #30 (Xuereb Dec) ¶¶ 3-6.

26 B

27 In opposition, Halterman offers three events that he
28 claims were unusual or unexpected and external to him: (1) delay as
the result of the stopover in Sydney (id at 8-10); (2) "atypical
turbulence which occurred during the flight that forced him to stay
seated" (doc #618 at 8, 11); and (3) the fact that "there might
have been inadequate pressurization or inadequate oxygen supply
because he felt that the air was stuff[y] and he felt a need to get
off the plane." Id at 11. The court addresses each argument
below.

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Halterman first argues that the stopover in Sydney was an "accident" causing his DVT. Qantas argues that the rerouting of QF94 cannot be an unexpected or unusual event because it was a preplanned decision. Doc #27 at 19. Qantas points to the Xuereb declaration as evidence that the rerouting was planned on October 23, 2002 (two days prior to Halterman's departure) and that the decision was made for commercial reasons. Doc #30 at ¶¶ 5-6. Because the stopover was a preplanned decision, Qantas argues, it cannot be an "accident." Doc #27 at 19.

Halterman strenuously objects to the declarations submitted by Qantas and points to purportedly conflicting evidence. Specifically, Halterman declares as follows:

My understanding from the cockpit announcement shortly after takeoff from Los Angeles is that there was some type of fuel imbalance and they needed to correct the problem by stopping to refuel in Sydney before proceeding to the ultimate destination of Melbourne. The cockpit announcement further explained that the flight was originally scheduled to continue on to Sydney after Melbourne and they were simply reversing the order of the stops due to the fuel imbalance situation and Sydney being the closer destination from Los Angeles. At no time did the pilot communicate that this was something preplanned. The cockpit announcement made it clear to me that this change was sudden and unexpected.

Doc #613, ¶ 4.

Halterman also testified in deposition as follows:

Q: And was there any reason given for having to stop in Sydney?

A: My recollection is they referred to it as a fuel imbalance where they - due to the extreme weight of the plane upon take-off they didn't think they had enough fuel to get all the way to Melbourne so they were going - as a safety precaution land in Sydney to re-fuel before continuing on to Melbourne. * * * [T]hey strictly referred to it as plane's too heavy with the fuel they could carry to make it all the way to Melbourne safely.

Doc #616, Ex F at 100:9-16, 22-24.

1 Qantas responds that whether plaintiff personally
2 expected the layover is irrelevant to the "accident" inquiry. Doc
3 #39 at 9. Qantas points to Husain v Olympic Airways, 116 FSupp 2d
4 1121, 1130 (ND Cal 2000) for the proposition that the accident
5 "inquiry is an objective one, and does not focus on the perspective
6 of the person experiencing the injury."

7 Halterman cites to no authority, and the court knows of
8 none, holding that a layover - preplanned or otherwise - triggers
9 an airline's liability under the Warsaw Convention. In addition,
10 common experience would indicate that, unfortunately, a layover is
11 not an unexpected event in the context of international air travel.
12 Halterman himself admits that his various connections to Australia
13 already included a 4-hour layover in Los Angeles.

14 The court does not foreclose the possibility, however,
15 that an unplanned stopover could comprise a link in a chain of
16 events causing injury. Moreover, the court agrees that the
17 evidence is in conflict as to the reasons for the stopover and
18 whether it was in fact pre-planned. Qantas's declarants fail to
19 submit any documentary evidence or other foundation for their
20 assertions that the layover - which happened almost five years ago
21 - was preplanned and made for commercial reasons.

22 For purposes of this motion, the court need not reach the
23 issue whether a layover constitutes an "accident" under the Warsaw
24 Convention, and the court declines to do so. Nor is it necessary
25 to burden a jury with the issue whether this layover might have
26 constituted an accident under the facts presented here. This is
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1 because Halterman cannot show any genuine issue regarding
2 causation.

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4 The mere occurrence of an accident does not lead to
5 liability under the Warsaw Convention. Rather, the accident must
6 have "caused the damage * * * sustained." 49 Stat 3000. In Saks,
7 the Supreme Court stated that, "[a]ny injury is the product of a
8 chain of causes, and we require only that the passenger be able to
9 prove that some link in the chain was an unusual or unexpected
10 event external to the passenger." 470 US at 406. The Supreme
11 Court also noted that Article 17 "cannot be stretched to impose
12 carrier liability for injuries that are not caused by accidents."
13 Id.

14 Halterman's theory here is that the stopover increased
15 the time that he was forced to sit. Doc #618 at 10 ("Plaintiff
16 Halterman is not claiming that sitting for a long time was the
17 unusual event that caused his DVT; instead, he claims that the
18 delays of the subject flight prolonged his having to sit and they
19 themselves were the unusual events.") But as Qantas points out,
20 the stopover made the flight into Australia shorter in duration
21 than if the flight had gone directly from Los Angeles to Melbourne.
22 Doc #39 at 11. And the stopover actually afforded Halterman more
23 time to walk around and exercise at the airport in Sydney than he
24 would have had if the flight went directly to Melbourne. Doc #27
25 at 19-20. Moreover, Halterman's declaration admits that he felt
26 the pain while deboarding in Sydney as a result of sitting - not
27 after the stopover or after arriving in Melbourne or even during
28 the stopover at the airport. Nothing prevented Halterman from

1 discontinuing his flight in Sydney. Finally, Halterman's only
2 other evidence of causation - a short doctor's note - is silent on
3 the stopover. The note only mentions "an economy flight from Los
4 Angeles." Doc #613, Ex A. Accordingly, Halterman submits no
5 evidence supporting his claim that the stopover caused his injury,
6 and no reasonable jury could so find under the circumstances of
7 this case.

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Halterman also argues that his DVT was caused by
"atypical turbulence which occurred during the flight that forced
him to stay seated." Doc #618 at 11. The only evidence of
turbulence on QF94 is Halterman's own testimony. In deposition,
Halterman stated:

Q: During your flight from Los Angeles to Sydney, did you
experience any turbulence?

A: Yes, there was turbulence on the plane.

Q: At what point in that flight did you first experience
turbulence?

A: I first experienced it towards probably the last three
hours of the flight when they were doing the breakfast
service. I was asleep most of the flight prior to that
time. * * * No, I guess - let me rephrase that. In the
last like three-hour segment when I was awake for the
duration of the last end of the flight probably the first
20 to 30 minutes of reawakening it was pretty bumpy.

Doc #27, Ex A at 102:17-25, 104:5-9.

In response to interrogatories, Halterman also stated
that "moderate to severe turbulence was experienced during the
Qantas flight - this was true during the Skywest and Delta flights
as well. During periods of turbulence, the seatbelt light was lit
in the cabin." Doc #27, Ex D at 2:12-14.

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1 Halterman relies on Magan v Lufthansa, 339 F3d 158 (2d
2 Cir 2003) for the proposition that turbulence can constitute a
3 Warsaw accident. In Magan, the plaintiff, John Magan, was a
4 passenger on a flight from Germany to Bulgaria. Id at 160. Magan
5 had left his seat to use the lavatory when he heard the pilot
6 announce that passengers were to return to their seats and fasten
7 their seatbelts. Id. The pilot made the announcement because he
8 anticipated turbulence after observing heavy thunderstorms
9 illuminated on his radar. In the course of returning to his seat,
10 the plane experienced an episode of turbulence, and Magan was
11 violently thrown against an overhang protruding from the ceiling of
12 the cabin. Id. The impact broke Magan's nose and dislodged a
13 dental bridge from his mouth, and Magan temporarily blacked out.
14 Id. Magan filed a claim against Lufthansa, and the district court
15 entered summary judgment for Lufthansa finding that the turbulence
16 encountered by the aircraft was not "severe" or "extreme" as
17 defined by the Federal Aviation Administration (FAA) and thus did
18 not constitute an "accident" under the Warsaw Convention. Id.

19 On appeal, the Second Circuit reviewed the Supreme
20 Court's Saks decision and the history of Article 17 and rejected a
21 bright-line rule of liability for particular weather events and all
22 their attendant consequences. Id at 163-64. The court also found
23 that there was conflicting testimony regarding the degree of
24 turbulence experienced, and therefore, that there was a material
25 issue of fact. Id at 165-66. Ultimately, the Second Circuit held
26 that whether turbulence constitutes an accident should be a "fact-
27 specific inquiry best left for resolution on an individual basis."
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1 Id at 165. Accordingly, the Second Circuit reversed the grant of
2 summary judgment and remanded for further proceedings.

3 The court need not decide whether Magan applied the
4 proper standard. Here it is not Halterman's contention that
5 atypical turbulence caused direct impact or other trauma to his
6 leg. Rather, Halterman claims that the turbulence should
7 constitute an "accident" because it forced him to remain seated.
8 This is, to say the least, a strained theory, and it carries Saks
9 and Magan to an illogical extreme. The court finds it appropriate
10 to quote the Southern District of New York's order in Margrave v
11 British Airways, 643 F Supp 510, 512 (SDNY 1986): "[S]uch a
12 definition of the 'accident' at issue distorts the factual record
13 in this case beyond recognition for the transparent purpose of
14 forcing plaintiff's injuries into the category of those compensable
15 under the Warsaw Convention." As noted above, Halterman testified
16 that turbulence on QF94 lasted only 20 to 30 minutes and that he
17 did get up when he was able to do so. Halterman's alleged
18 "accident" is, in effect, "prolonged" sitting.

19 Even accepting Halterman's theory, it cannot be
20 unexpected that there will be periods during a flight that a
21 passenger is required to remain in his or her seat due to
22 turbulence. And it cannot have been the intent of the Warsaw
23 Convention that basic safety precautions create liability for
24 airlines. To the contrary, these safety precautions are intended
25 to prevent the type of "accidents" that would expose airlines to
26 liability, as the facts in Magan illustrate. Cf Saks v Air France,
27 724 F2d 1383, 1389-90 (9th Cir 1984) (Wallace, J, dissenting),
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rev'd, 470 US 392 (1985) (intent of the Warsaw Convention was not to make carriers insurers of their passengers' well-being, but to create incentives for safe and economical air travel)).

Moreover, Halterman was able to walk to the lavatory and did so "once or twice" by his own admission. Halterman also admitted that he had other opportunities to walk around but voluntarily decided not to do so out of courtesy to fellow passengers. And Halterman admitted he spent much of the flight sleeping. It is difficult for the court to discern a triable claim arising out of the two to three hours when Halterman was awake and did have opportunities to walk around (and did walk around) against a backdrop of a significantly longer stretch of time in which Halterman was asleep and, it is safe to assume, in his seat. These facts cast significant doubt on the proposition that prolonged sitting (or "turbulence") somehow caused plaintiff's injury.

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Finally, Halterman argues that "there might have been inadequate pressurization or inadequate oxygen supply because he felt that the air was stuff [sic] and he felt a need to get off the plane." Doc #618 at 11. This allegation is wholly deficient, and Halterman fails to meet the "significant probative evidence" standard required to overcome summary judgment. Moreover, this allegation is contrary to Halterman's deposition testimony wherein he admitted that he has no reason to believe that there was irregular altitude, inadequate air circulation, inadequate oxygenation or inadequate pressurization on the flight. Doc #27, Ex A (Halterman dep) at 101:10-25, 102:1-16, 111:11-25, 112:1-7.

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1 Plaintiff attempts to downplay this testimony by asking
2 how "a passenger could possibly be in possession of such
3 knowledge." Doc #618 at 11. The answer is simple: discovery.
4 "[T]he plaintiff must present affirmative evidence in order to
5 defeat a properly supported motion for summary judgment. This is
6 true even where the evidence is likely to be within the possession
7 of the defendant, as long as the plaintiff has had a full
8 opportunity to conduct discovery." Anderson v Liberty Lobby, Inc.,
9 477 US 242, 257 (1986).

10 Qantas represents that plaintiff has never demanded to
11 inspect or test the pressurization system or the oxygenation system
12 of the subject aircraft and has never propounded a single discovery
13 request regarding the pressurization or oxygenation systems. Doc
14 #39 at 17-18. Plaintiff does not deny that he has had opportunity
15 to propound appropriate discovery. Plaintiff has never made a
16 motion to compel or motion for continuance to conduct further
17 discovery. Instead, plaintiff now accuses Qantas of destroying
18 records, stating that Qantas relies "on the passage of time as
19 their excuse maintaining that the documents have been purged." Doc
20 #618 at 12. Plaintiff offers no support for the accusation that
21 Qantas destroyed records on aircraft pressurization or oxygenation.

22 Plaintiff also attempts to overcome his evidentiary
23 deficiency with citation to medical journals that indicate that
24 factors such as irregular altitude and inadequate air circulation,
25 oxygenation and pressurization "play a role in the development of
26 DVT." Doc #618 at 12, Doc #611, Exs A-E. This evidence is
27 irrelevant for purposes of Qantas's motion. None of these articles
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1 speaks to conditions on QF94. Accordingly, Qantas's evidentiary
2 objections to these articles, doc #40, are sustained.

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5 The only remaining issue is Halterman's FRCP 56(f)
6 request for further discovery. Doc #618 at 17-21. The party
7 seeking a Rule 56(f) continuance should demonstrate that: (1) it
8 has set forth in affidavit form the specific facts that it hopes to
9 elicit from further discovery; (2) the facts sought actually exist;
10 and (3) these sought-after facts are essential to resist the
11 summary judgment motion. California v Campbell, 138 F3d 772, 779
12 (9th Cir 1998).

13 Whether to allow further discovery under Rule 56(f) is a
14 subject committed to the district court's discretion. Nidds v
15 Schindler Elevator Corp, 113 F3d 912, 920 (9th Cir 1996). In
16 considering such a request, the stage of the litigation is an
17 important consideration. For example, if the movant has failed
18 diligently to pursue discovery in the past, the court has
19 discretion to deny the Rule 56(f) application. Id. "Failure to
20 comply with the requirements of Rule 56(f) is a proper ground for
21 denying discovery and proceeding to summary judgment." State of
22 California v Campbell, 138 F3d 772, 779 (9th Cir 1998) (internal
23 citation omitted); see also Weinberg v Whatcom County, 241 F3d 746,
24 751 (9th Cir 2001); Kitsap, 314 F3d at 1000.

25 As an initial matter, the court is concerned with the
26 adequacy of the declaration - or more properly, the portion of a
27 declaration - Halterman has filed to justify a FRCP 56(f) motion.
28 Halterman's counsel states:

[P]laintiff requests that based on defendant's late submission of evidence that the Court provide plaintiff Halterman additional time to take the deposition of the two pilots, Mr Paull and Mr Clifton, as well as Mr Xuereb to uncover the source of their information. Plaintiff would likewise request an opportunity to propound a set of interrogatories to inquire what are the methods of recording the events of the subject flight as well as inquire into the sources of all their information. Plaintiff also requests an opportunity to propound a Request for Production of Documents demanding all documents referred to by the declarants, as well as reviewed, read, prepared by them in preparation of their testimony. Plaintiff will also inquire about the preparation of the declaration and whether same was made in their own words due to the fact that both pilot declarations are identical. In addition, plaintiff requests all documents that provided the basis for either declarant's 'understanding' as is stated in their verbatim and identical declarations should be provided. In addition, a full unredacted passenger/flight manifest should be provided to plaintiff.

Doc #616, ¶ 20.

The court does not see how the statements in counsel's 56(f) declaration identify specific facts Halterman hopes to elicit from further discovery, show that those facts exist or show that those facts are essential to resist summary judgment. See Campbell, 138 F3d at 779. Rather, it appears that Halterman is grasping at straws.

Accordingly, Halterman's Rule 56(f) application is
DENIED.

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IV

In sum, Halterman's FRCP 56(f) application is DENIED. Qantas's motion for summary judgment is GRANTED. Because the court does not consider Qantas's declarations in deciding this motion, it need not rule on Halterman's evidentiary objections to the said declarations. The clerk is DIRECTED to close the file, terminate all motions and enter judgment in 04-3953.

SO ORDERED.



VAUGHN R WALKER

United States District Chief Judge